Harris-Teeter Super Markets, Inc. *and* United Food and Commercial Workers Union, Local 204, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC. Cases 11–CA–13198, 11–CA–13588, 11–CA–13911, and 11–CA–14179

June 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 30, 1991, Administrative Law Judge Robert A. Gritta issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

In his decision, the judge found that the Respondent's representatives engaged in direct dealing with salvage dock employees when the representatives met with the employees to announce a change in the employees' workweek schedule. According to the judge, both the General Counsel's and the Respondent's witnesses testified that some form of questioning of the employees occurred. The judge found that whether the questioning was of the direct form as stated by the General Counsel's employee witnesses, i.e., ''Does anyone have a comment?'' or ''Who was for it [the change]?'' or more subtle, as stated by Day-Shift Manager Johnson and Supervisor Dunegan, i.e., ''Any questions?'' the result was the same. We do not agree. Asking whether an employee has any questions about a newly instituted policy is different from soliciting an employee's opinion on the implementation of the policy. Without a specific credibility finding, we are unable to make a decision on this issue. Accordingly, we remand this portion of the case to the judge for him to make appropriate credibility findings, without reopening the hearing.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified, and orders that the Respondent, Harris-Teeter Super Markets, Inc., Charlotte, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) of the judge's Order and reletter all subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the portion of this proceeding relating to allegations of direct dealing by the Respondent is remanded to Administrative Law Judge Robert A. Gritta for credibility findings, without reopening the hearing. The judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended Order in light of the Board's remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent unilaterally and in violation of Sec. 8(a)(5) of the Act changed its employees' work schedule, we need not rely on that portion of the judge's discussion (in sec. IV,D) to the extent that it suggests that the Union was entitled to ''reasonable advance notice'' of any proposed changes. We find that, regardless of notice, the Respondent was not privileged by the language of the 1988 Letter of Understanding to change unilaterally its employees' work schedule.

In the analysis portion of sec. IV,F, of his decision, the judge speculates about whether the nonbargaining unit refrigeration mechanics constituted an accretion to the existing refrigeration mechanics' bargaining unit. We do not rely on this accretion discussion.

Additionally, we agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) when it reassigned bargaining-unit refrigeration mechanic Wade Sexton's territory to a nonunit mechanic without bargaining with the Union. See *Kohler Co.*, 292 NLRB 716, 720 (1989) (''an employer violates Section 8(a)(5) and (1) of the Act by reassigning work performed by bargaining unit employees to others outside the unit without affording notice or an opportunity to bargain to the collective-bargaining representative'').

[2] In his Conclusions of Law, the judge finds that the Respondent violated Sec. 8(a)(1), (3), and (4) of the Act when it discriminatorily issued warnings to its employees. He failed, however, to make a specific finding that the Respondent violated Sec. 8(a)(4) when it issued a written constructive advice warning to employee Craig for his alleged interrogation of employee Goodwin. The judge found that Day-Shift Manager Johnson seized on Craig's conversation with Goodwin and disciplined Craig in retaliation for Craig's earlier testimony at a Board hearing. We agree and find that by this conduct the Respondent violated Sec. 8(a)(4) of the Act.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue discriminatory warnings to employees for infractions of company rules.

WE WILL NOT enforce our oral rule against employees accepting gifts from vendors based on our employees' union sympathies.

WE WILL NOT unilaterally change our employees' work schedules.

WE WILL NOT unilaterally employ casual employees to work in the cafeteria, except as permitted by the collective-bargaining agreement.

WE WILL NOT unilaterally remove work from the bargaining-unit refrigeration mechanics.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain collectively in good faith with United Food and Commercial Workers Union, Local 204, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC as the exclusive bargaining representative of all employees in the certified unit. The unit is:

> All employees employed by us at our Charlotte, North Carolina distribution center and bakery, including leadmen, dispatchers, warehouse clerical employees, drivers, fork lift maintenance employees, refrigeration mechanics, and regular part-time employees, excluding office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL notify James Craig, Terry Rogers, Doug Blake, and Donald Allen that we have removed from our files any reference to their warnings and that the warnings will not be used against them in any way.

WE WILL reduce our oral rule against employees accepting gifts from vendors to writing or explain the substance of the rule to all employees.

HARRIS-TEETER SUPER MARKETS, INC.

Jane North, Esq. and *Joseph T. Welch, Esq.*, for the General Counsel.

J. Howard Daniel, Esq. and *E. Leigh Mullikin, Esq.*, for the Respondent.

Eileen Hanson, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on January 22, 23, 24, and 25, 1991, in Charlotte, North Carolina, based on charges filed by United Food and Commercial Workers Union, Local 204, affiliated with United Food and Commercial Workers International Union, AFL–CIO–CLC (the Union) in February and November 1989, and July and December 1990 and a complaint issued by the Regional Director for Region 11 of the National Labor Relations Board on January 8, 1991. The complaint alleged that the Harris-Teeter Super Markets, Inc. (Respondent) violated Section 8(a)(1), (3), (4), and (5) of the Act by changing work assignments of employees, dealing directly with unit employees, changing work rules, issuing warnings to unit employees, and removing work from bargaining unit for assignment to nonunit employees. Respondent's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel and Respondent on April 1, 1991. Both briefs were duly considered.

Upon the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Harris-Teeter Super Markets, Inc. is a North Carolina corporation engaged in the retail sales of groceries, produce, and other goods in several States with a warehouse and distribution center in Charlotte, North Carolina. Jurisdiction is not in issue. Harris-Teeter Super Markets, Inc. in the past 12 months in the course and conduct of its business operations purchased and received goods and materials at its Charlotte warehouse facility valued in excess of $50,000 directly from points located outside the State of North Carolina and shipped products from its Charlotte warehouse facility valued in excess of $50,000 directly to points located outside the State of North Carolina and derived gross revenue in excess of $500,000.

I conclude and find that Harris-Teeter Super Markets, Inc. is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND[1]

Respondent operates retail grocery stores in Virginia, South Carolina, and North Carolina. When the bargaining unit was originally described, a distribution center including an employee cafeteria and bakery was located at Chesapeake Drive, Charlotte, North Carolina. The retail grocery stores were supplied from the distribution center. Sometime later the distribution center was moved to its present location on Indian Trail just outside the limits of Charlotte. The cafeteria continues to operate but the bakery was closed in 1989. The distribution center, also known as the Indian Trail warehouse, is the only union-organized division of Respondent.

Historically refrigeration service for the retail stores was administered from the Charlotte distribution center where all refrigeration mechanics were assigned. At the time of union certification Respondent employed 7 refrigeration mechanics to service 55 retail grocery stores and 17 Holly Farms outlets. Each mechanic's geographic territory was determined by his personal domicile and the location of retail stores approximate to his domicile. The territories were basically equal in numbers of stores to ensure proficient servicing. As new stores were opened and old stores closed the territories were adjusted to maintain equality and efficiency.

In 1984 Respondent merged with Food World resulting in a nonbargaining unit group of refrigeration mechanics working out of the Greensboro warehouse of Food World and a realignment of all refrigeration mechanics service areas without regard to placement unit. Following realignment 9 bargaining unit mechanics serviced 79 stores and 6 nonbargaining unit mechanics serviced 48 stores. By 1986 the unit mechanics were 8 in number servicing 75 stores and the nonunit mechanics numbered 5 servicing 44 stores. Beginning with the merger and continuing today, stores assigned to refrigeration mechanics on the basis of geography resulted in unit mechanics servicing stores formerly serviced by nonunit (Food World) mechanics and vice versa. The dynamics of store openings and closings made realignments necessary constantly and dictate the dual service functions of the unit and nonunit mechanics.

The April 1988 acquisition of 51 Big Star stores resulted in 20 new store openings and a territory realignment for mechanics in May 1988. The most recent realignment occurred in March 1989 utilizing 8 unit and 8 nonunit mechanics for a substantially equal service requirement of each refrigeration mechanic.

I take judicial notice of the prior case involving this Respondent tried on September 12 and 13, 1988, with a judge's decision issuing December 12, 1988, and the Board's Order of April 10, 1989 (*Harris-Teeter*, 293 NLRB 743 (1989)) and the unpublished decision of the Fourth Circuit Court of Appeals dated May 10, 1990 (No. 89–3326, J–2720) enforcing the Board's Order.

III. THE APPROPRIATE UNIT

The complaint alleges and Respondent admits the following to be the appropriate bargaining unit:

> All employees employed by Respondent at its Charlotte, North Carolina, distribution center and bakery including leadmen, dispatchers, warehouse clerical employees, drivers, fork lift maintenance employees, refrigeration mechanics and regular part-time employees, excluding office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

The Union became the certified representative of Respondent's employees on August 5, 1976. Although Respondent, in its answer, denies that the Union's representation has been continuous, there is no intervening suspension or withdrawal of certification by the Board. Therefore the Union remains the certified representative of Respondent's employees. Respondent amended its answer to admit that the Union was the exclusive bargaining representative for all periods relevant herein.

Originally the distribution center was located on Chesapeake Drive in Charlotte and included a bakery, an employee cafeteria, and dispatching of the refrigeration mechanics to the various retail stores to which they were assigned. Prior to 1989 the facility was moved to a new location in the environs of Charlotte known as Indian Trail. Thereafter the bakery operation and dispatch of the refrigeration ceased but the cafeteria remained in operation. Respecting those evolutionary changes the unit description remain substantially accurate.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Changed Work Assignments—Roosevelt Woodley*

It is undisputed that Woodley, a forklift operator in the meat department, sustained an off-the-job injury (broken hand) (during the Thanksgiving holidays. Woodley returned to work December 28, 1988, with a doctor's release from his 6 a.m. shift. After working several hours, Supervisor Dunegan reassigned him to breakdown in the deli aisle a related department where there was a worker shortage. Woodley was wearing a handbrace and determined that his hand was not strong enough to handle the big boxes required of the breakdown task. Woodley told Dunegan he could not do the breakdown because of a weak hand. Dunegan said the doctor's release did not have any restrictions and if Woodley could not do the work he should go home. Woodley opted to stop work and report back to the doctor. Woodley returned to work January 2, 1989, with a doctor's release.

Dunegan stated that all he needs to know is that an employee has a doctor's release which tells him the employee is there to work. Dunegan rotates the reassignments during the day among the employees in the department and Woodley was next on the rotation list when he returned to work.

Both Johnson, the day-shift distributor manager, and Kiser, director of the center, stated that the company policy of directing employees during a shift to perform more than one job is contained in the work rules, No. 23, negotiated with the Union. Johnson, Kiser, and Dunegan admit knowing that Woodley was a prounion employee and has been since 1986.

Although Woodley could not recall more than one prior occasion in 1988 being assigned to breakdown, Dunegan produced daily work schedules showing Woodley's temporary assignments to breakdown: three times in 1988; five times in 1989; two times in 1990. The schedules also showed that

[1] Undisputed testimony and objective evidence in the record.

other than Woodley 46 assignments to breakdown were made in 1989 and 29 were made in 1990.

Chief Steward LeGrand and Woodley testified without contradiction that in November 1988 Woodley was disciplined for unauthorized phone use but on a presentation by LeGrand to Manager Johnson, including a demand to inspect the phone records, Johnson became angry and terminated the meeting by issuing the discipline to Woodley.

Analysis

General Counsel alleges that Respondent changed Woodley's work assignment from forklift operator in the meat department to breakdown in the deli aisle on December 28, 1988, because Woodley was a union member who recently exercised his union rights. She contends that the confrontation between Chief Steward LeGrand and Johnson on behalf of Woodley in November 1988 precipitated Dunegan's choice of Woodley for reassignment to the deli aisle. General Counsel does not contest Dunegan's rotating schedule of reassigning employees during shift other than to characterize it as not formal. Nor does she contest Dunegan's right to make reassignments during shift. General Counsel's argument is bottomed on Dunegan's motivation in selecting Woodley for reassignment when other employees were available and is cited as arbitrary conduct.

Albeit I agree that Dunegan's conduct was arbitrary and tantamount to what one could expect from a harsh task master, I do not conclude that it violates the Act. The evidence is insufficient to infer a discriminatory motive in Dunegan's selection of Woodley for reassignment. The uncontroverted evidence shows that employees are selected in rotation for the more strenuous jobs in the warehouse and it was Woodley's turn in the schedule. The fact that Dunegan would not defer to Woodley's apparent less than 100-percent physical condition and assign someone else is no more than a lack of consideration. It may be reprehensible in a sociomoral sense as a standard for the workplace but it is not conduct violative of Section 8(a)(3) of the Act, and I so conclude and find. I shall therefore dismiss paragraph 11 of General Counsel's complaint.

B. *Warnings to Craig, Rogers, Blake, and Allen*

Complaint paragraphs 10, 13, and 17(e)

The salvage dock is a somewhat remote work area in that it is on one end of the warehouse facility and is separated from the inside work areas by a large curtain. Dunegan's testimony shows clearly that the salvage dock employees work individually or in teams depending on the number of trucks to be unloaded and the nature of the materials in the trailers. There are times when the employees are caught up on the unloading but as Dunegan says, there is always something to do, such as cleanup and sweeping the docks. Dunegan also states that employees always talk while working and joke among themselves and his job is to keep the employees working. Although employees talking when they should be working is not a new problem Dunegan states that from the fall 1988 to January 1989 there was an increase of employees talking in groups. What Dunegan describes as excessive talking and grouping came during the heaviest season for the dock. Although no supervisor or management person acknowledged that a rule against talking existed, Kiser, the director of the center (warehouse) cited the work rule prohibiting loitering as the basis for disciplining employees whose talking interferes with their work. Johnson, day-shift distribution manager, states that employees talking in groups can be warned when the talking interferes with any employee doing his job. Johnson adds that any employee talking to someone is talking in a group. Kiser, Johnson, and Dunegan explained that employees are disciplined whenever talking interferes with their work and produced records of past disciplines of employees for unauthorized breaks, excessive breaks, out-of-work area, too much time in smoking area coupled with talking with every employee encountered en route, and low production or excessive errors caused by too much talking. Johnson added that an employee can be orally disciplined any number of times before a written constructive advice form is executed. In each individual case the supervisor involved decides how many oral disciplines for a given employee before administering a writeup. There are no guidelines for severity of the infraction for supervisors to follow. Dunegan pursuant to the discipline policy will orally warn employees against talking when in his view the talking interferes with the employees' job. Dunegan considers huddling or grouping by employees to interfere with their work and as a supervisor he knows which employees persist in talking and not working. Those who persist receive more discipline. He orally disciplines the employees and may make a written record for the involved employees files. The written record of the oral discipline is specifically designed to aid the Company in its EEOC investigations and as a record of prior disciplines for individual employees. Any employee orally disciplined is not advised that a memo of the discipline is placed in their file. The employee only becomes aware of the prior oral disciplines in his file when he receives a constructive advise form (writeup) which references the past oral disciplines as support matter. No employee has a right to see his disciplinary file and is never shown the documentation. On any employee's request the supervisor will review past incidents with the employee but the documentation remains secret. Kiser, who has been on the Company's negotiating team since 1986, stated that the Union has asked for copies of the supervisors' memos of oral disciplines but the Company has refused to provide any copies. The Company has provided constructive advice forms and attendance files of particular employees when the Union had made a specific request.

Dunegan stated that the numbers of disciplinary warnings for talking among the salvage dock employees increased after the unfair labor practice trial in September 1988 and through January 1989. He issued 18 separate warnings to individual employees for talking, grouping, or being out of their work area. Dunegan could not, however, recall the circumstances leading to any of the incidents. Without having the documentation before him Dunegan was unable to testify about the disciplines. As Dunegan stated from the stand, ''I can only read the documents.'' The first such document (R. Exh. 47) contains the notation that Dunegan told the employees he intended to keep a better watch on them.

The documentation of disciplines from the trial exhibits (with some duplication) shows:

> Douglas Blake; orally disciplined for standing and talking in May 1986 with a memo to his file, dis-

ciplined with a write-up for out of work area in March 1987, orally disciplined for overstaying break in November 1988 with a memo to his file.

Terry Rogers; orally disciplined for being out of his aisle and talking with a memo to his file in March 1987, orally disciplined for overstaying break in November 1988 with a memo to his file.

Donald Allen was not individually disciplined in any of the immediate preceding years during his 6-1/2 years on the salvage dock.

James Craig; orally disciplined in May 1985 and September 1989 for unauthorized breaks with memos to his file, orally disciplined twice in October 1987 for talking on dock with memos to his file.

In addition to the individual disciplines above, Craig, Allen, Rogers, and Blake, as a group received: oral discipline September 28, 1988, for standing at the dumpster or curtain on the dock with a memo to each employee's file, oral discipline December 6, 1988, for standing or sitting with a memo to each employee's file, written discipline, a constructive advise form, December 22, 1988, for standing or sitting on jacks in a huddle and talking and neglecting their duties and oral discipline January 27, 1989, for being huddled on the dock.

None of the dock employees disciplined between September 1988 and January 1989 were aware of any prohibitions against employees talking while in a group and contrary to Dunegan, employees Allen, Craig, Blake, and Rogers stated that the salvage dock employees had always talked while they worked whether working individually or as a team. Allen stated that prior to September 1988 the employees had never been warned about talking as a group. Craig added that before September Dunegan never said anything about the employees talking while they were working as a team or in a group, however, since September Dunegan talked to him frequently about the employees talking on the job. Blake testified that on September 28, 1988, the employees were indeed talking but they were also working. Blake was stacking pallets, Craig was stacking milk and egg crates, and Bitterman and Allen were working in the trailer on crates. Blake recalls that Dunegan said the employees were talking and he was going to put it in their records.

Rogers testified that on December 22, 1988, Craig came back from Johnson's office and told the group what Johnson had said. It was then that Dunegan said they were grouping and talking. Blake stated that he, Rogers, Craig, and Allen were stacking and cleaning crates when Dunegan said they were talking in a group. Dunegan called them to his office and gave each a writeup. Dunegan told the group he was not going to tolerate them talking and stuff because they were cheating the Company out of money and time and this incident will go on their records. Allen testified that he came out of the trailer to the dock and the employees were talking about time off at Christmas. Dunegan came up and said employees were in a group again and he was not going to tolerate it anymore. Shortly, Allen left for vacation. When he returned from vacation on January 2, 1989, he was called to the office by Kiser, Brewer, and Dunegan. Allen was told that management was tired of employees talking and having group conversations. Allen told management that he was working at the time. Dunegan said the Company was not going to tolerate the employees being in a group even if they were doing their job. Dunegan then gave Allen a writeup for the December 22, 1988 incident. Craig testified that on December 22, 1988, while working on the dock he went to Johnson's office and asked if the dock employees could work Saturday rather than Christmas Sunday. Johnson told Craig he would get back to him. When Craig got back to the dock the employees were working on two trailers. He told the other employees what Johnson had said. Dunegan then burst through the curtain and said the employees were in a group. Craig told Johnson he was only telling the employees what Johnson had said about working on Christmas. Dunegan said but you all were in a group. A week later Dunegan called the four dock employees into the office and gave them a writeup for being in a group and talking. Dunegan told the employees if they did not want to sign the writeup go back to work. Dunegan had no recall of the incident but he emphasized that the documentation showed the employees had only been on the job for 28 minutes when he walked through the curtain. Dunegan wrote up the employees for standing or sitting in a huddle and neglecting their duties.

Relative to the January 27, 1989 discipline of the same four employees Dunegan could only say that he gave each a warning and he made notes for each employee's file. Rogers stated that he had two loads of milk crates on the front of his lift and a half load on the back of his lift. Craig was loading milk crates on pallets as Rogers passed. Rogers stopped and Craig began adding crates to Rogers' load on the back of the lift. Allen and Blake were on one side of Craig and Rogers but could not get through. Dunegan came onto the deck and saw that Allen and Black were temporarily blocked and said the employees were not doing their job and were in a group again. Rogers said at times the dock does get congested and this was one of those times. Allen testified that on January 27 the employees were working close together and they were talking. Dunegan came to the dock, saw the employees and said they were in a group again. He told the employees to follow him to Johnson's office. When the employees were told they were being disciplined for talking in a group Blake asked Johnson if this was a racial thing. Johnson said, ''I'm tired of hearing this shit, get the hell out of my office.''

Employee Mark Goodwin when asked about the company policy on talking stated that a year ago Dunegan saw him talking to another employee and Dunegan told him to keep the talk short and get back to work.

Joint Exhibit 9 is the constructive advice form (writeup) issued to James Craig on November 7, 1988, for an incident that occurred on November 3, 1988. Johnson, day-shift manager, testified that Mark Goodwin told him of being harassed and called a snitch for causing an employee's discharge. Johnson told Goodwin that it was hard to prove but asked Goodwin to give a statement as part of the investigation. Johnson after getting the statement from Goodwin wrote a constructive advice form on James Craig. Johnson summoned Craig to the office and told him that he had a sworn statement and would not allow interrogation or harassment and gave Craig the written discipline.

Mark Goodwin stated that James Craig approached him on the salvage dock in late 1988 and said he wanted to know what happened, why did I do it, why did I turn the employee in and things like that. Craig asked two or three times but

did not raise his voice or put any hands on Goodwin and Craig was not up in his face. The conversation lasted about 2 minutes. Goodwin said he felt threatened by the group of dock employees because they were laughing but he left the dock unimpeded. Goodwin reported to Johnson that he was questioned about Jesse Boyd's termination but he did not tell Johnson he felt threatened. He did give a statement to Johnson about the incident (R. Exh. 9). After Goodwin finished his report, Johnson said he would issue a warning to Craig. Goodwin said he had been harassed quite a bit at the warehouse. Employees won't leave him alone when he wants to be left alone or they want to talk when he doesn't want to listen.

Allen testified he was on the dock in late October 1988 when Goodwin came into the area on a forklift. He had to stop because the dock was congested. While he was stopped Craig asked him if he had told on somebody about sleeping. Goodwin told Craig that he had not told on anyone then moved his forklift down the dock. No supervisor had asked Allen about the incident.

Rogers testified he was on the dock when Goodwin came to put a load by the dumpster. Craig asked Goodwin about the rumor that was going around that Goodwin had talked to Dunegan about someone sleeping. The two talked for 2 or 3 minutes. The other dock employees were talking and laughing. No supervisor talked with Rogers about the incident.

James Craig testified that in October 1988 there was a rumor in the warehouse that Mark Goodwin had gotten Jesse Boyd fired. When Goodwin came to the salvage dock Craig told him of the rumor and asked if he did do it. Goodwin said he did not do it. Craig said, ''come on Mark, tell the truth, did you do it?'' Goodwin again said, ''no.'' The conversation lasted 2–3 minutes. The salvage dock employees heard the conversation and laughed after it was over. Craig did not threaten Goodwin either physically or verbally. The next day Johnson called Craig to the office and gave him a prepared constructive advice form for interrogating, embarrassing, and demeaning another employee. (Jt. Exh. 9.) Craig said, ''that was not the way it happened. Johnson said it was none of Craig's business, Company won't tolerate, if it happens again termination.'' Craig said, ''but,'' Johnson said, ''That's just it.'' Craig took the writeup to Kiser and told him he did not interrogate Goodwin. Kiser said when an employee gives information to the Company, the Company has to protect him. Craig stated that neither Johnson or Kiser asked Craig about what happened.

Analysis

It is clear from the record evidence that Respondent does not have a rule against employees talking while working, however, testimony of several supervisor witnesses would indicate that at some point in time conversations among employees became more noticeable. Dunegan's admitted effort to keep a better watch on the salvage dock employees and his pledge to inform Johnson of their activity would, by inference, place the time of notability immediately after the Board trial in September 1988.

Respondent's disciplinary procedure is neither progressive nor is it written. Without regard to whether a rule existed the record testimony and objective evidence clearly shows that talking among employees was tolerated, to a degree, in the warehouse. The focus of scrutiny is the latitude of the tolerance as impacted by the disciplinary procedure. The disciplinary procedure contains no guidelines or standards of application. Each supervisor is endowed with discretion to determine who to discipline and when to discipline with the added feature of determining whose discipline should be memorialized in the employee's file. Thus, the discipline procedure is tripartite when invoked. An employee may be orally disciplined with no memo, or orally disciplined with a written notation for their employee's file, however, the notation is not made known to the employee or disciplined by a written reprimand usually with the warning that subsequent incidents could lead to discharge. Such a procedure lends itself to disparate treatment of employees, not only in the supervisors' choice of who to discipline but in the case of file memos resulting from oral discipline the employee is never afforded an opportunity to question the supervisors' version of the events.

Dunegan's focus on the salvage dock employees was contemporaneous with Craig's and other employees' participation in the Board's process. As General Counsel opined, Craig was the lightning rod on the dock. The questioned disciplines could only be explained by Dunegan's secret notations incorporating generic phraseology, such as ''neglect of duties.'' Dunegan could not recall the circumstances requiring employee witnesses, however, credibly testified that the disciplines were not as recorded by Dunegan because the employees were in fact working in each circumstance. There is some downtime for salvage dock employees. When shipping related duties are finished the make work phase of sweeping and cleaning is expected of the employees. Dunegan's reference to employees persisting in talking and interfering with their own or others work is not borne out by the record. None of the four employees have a discipline history even approaching persistence as shown for other employees in Respondent's proffered exhibits. In addition a substantial number of the cited priors are either unrelated to talking as a vice in the performance of duties or too remote for consideration with the current disciplines. Further, the practice of unrecorded admonishment for talking by warehouse employees, as credibility testified to by Goodwin, apparently was not practiced on the salvage dock beginning in September 1988. Dunegan's reference to the busiest of seasons occurring from September through December cannot explain what was so different on the salvage dock in 1988. The busy seasons are perennial and the employees on the dock are experienced. I find it instructive that none of the disciplines were related to specific losses of production measured by any employee's lessoned performance. Dunegan's unprecedented disciplines issued in such a short time can only be attributed to something other than the dock employees' work performance. I conclude it is most plausible that Dunegan personified his intent to keep a better watch on the dock employees by increasing the incidence of recorded discipline.

Albeit General Counsel included in her complaint (par. 17(e)) an allegation that Respondent violated Section 8(a)(5) of the Act by unilaterally promulgating a rule against employees talking while in groups there is insufficient evidence for such a finding. I do conclude that Respondent's disciplinary procedures were applied disparately to the salvage dock employees beginning with the close of the Board case in September 1988. I further conclude that the unprecedented

increase in disciplines for the salvage dock employees lacked a reasonable explanation by Respondent and constituted an unexplained variance from past procedures.

General Counsel's complaint alleges discriminatory disciplines to salvage dock employees Craig, Rogers, Blake, and Allen between September 28, 1988, and January 27, 1989. She must satisfy the causality test of *Wright Line*, 251 NLRB 1083 (1980), to prevail. I conclude that General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the disciplined issued to the salvage dock employees. Further the Respondent had failed to demonstrate that the disciplines would have been issued to the salvage dock employees even in the absence of their protected conduct. I therefore conclude and find that Respondent discriminatorily disciplined James Craig, Terry Rogers, Douglas Blake, and Donald Allen, individually and collectively on September 28, 1988, December 6, 1988, December 22, 1988, and January 27, 1989, in violation of Section 8(a)(3) and (1) of the Act as alleged in paragraph 10 of the complaint.

James Craig was involved in an additional discipline on November 3, 1988. The circumstances of the event and Johnson's reaction to the event are undisputed. The issue for determination rest on Johnson's motivation in issuing discipline to Craig for his conduct on the dock. Craig was accrued of interrogating and embarrassing employee Mark Goodwin following his report of the conversation to Johnson. Johnson although asking for Goodwin's statement as part of an investigation failed to do anything other than prepare a written discipline (constructive advice form, Jt. Exh. 9) for Craig. Johnson did not interview Craig for his version of the event nor did he interview the other known witnesses. Even a perfunctory investigation would have disclosed, as did the trial testimony, facts less supportive of embarrassment and definitely not supportive of interrogation as that term is used by Johnson in the discipline. There is no evidence in the record to suggest that Respondent attempts to limit conversations of employee's to their own personal business or to subjects relevant to their job or the performance thereof. Craig only asked a question based on a rumor, there was no touching, no temper, no loud voice, and no intimidation other than that momentarily perceived by Goodwin from the dock crew in attendance. Goodwin candidly described what he considers harassment, as he used the term, and the nature of his complaint to Johnson. Johnson simply embellished what was nothing more than two employees talking on the dock, as evidenced by Goodwin's statement (R. Exh. 9) which was all he had before him. The substance of the constructive advice form is incongruous with the substance of the statement and Goodwin's credible testimony.

Based on Johnson's usurpation of Goodwin's bland statement, the management attentiveness to the salvage dock employees following the Board trial in September 1988, particularly Craig's involvement as a witness against Johnson and Dunegan, Johnson's failure to investigate the incident before meting out discipline, and the lack of any reasonable explanation for variance from past disciplinary procedures I conclude that Johnson seized on an otherwise normal occurrence to issue a written discipline to Craig as retaliation for his participation in the Board's processes. I further conclude that General Counsel has presented a prima facie case of discrimination and that Respondent has failed to offer substantial evidence in rebuttal. General Counsel has thus satisfied the standards for proof as established in *Wright Line*, supra. I find that Respondent's discipline of Craig on November 7, 1988, for his conversation with Mark Goodwin was discriminatorily motivated and violates Section 8(a)(1) and (3) of the Act as alleged in complaint paragraph 13.

C. *Use of Casual Labor in Cafeteria*[2]

The parties have been embroiled in disputes over the use of casual employees since the early eighties. Usually when the Union learned that casuals were being used it filed an unfair labor practice charge. In 1986, 10 separate charges were settled by the parties in a single outside the Board agreement. Union Representative Hanson testified that the agreement was partially precipitated by the Company's use of a retired Harris-Teeter employee, Henry Taylor, at less than the union wage as a temporary employee for 40 hours per week. Personnel Administrator Murray testified that the Company used a lot of casuals in the bakery because the operation was in a phase out stage and whenever the Union discovered the use of casuals it objected and filed a charge. The paragraphs in the settlement agreement germane to casuals/temporaries are 5 and 9. (Jt. Exh. 10.) They read:

> 5. Harris Teeter Supermarkets agrees not to subcontract bargaining unit work without first bargaining with the Union.
>
> 9. In consideration for all of the above, the Union agrees that the Company may use casual labor in its bakery and cafeteria to file in for absenteeism, vacations, illness, or disability, provided that casual labor will not be used to avoid paying wage rates established by agreement with the Union.

Murray stated that the parties had a short period of time to draft the paragraphs on casuals and originally the language applied to all departments of the warehouse. The Union did not want the agreement to apply through the warehouse so bakery and cafeteria was careted into the paragraph. Murray based the limited language of the paragraph on the rush of the moment.

In 1987 four additional charges were filed including allegations of continued use of casual employees outside the 1986 agreement. Timothy Stokes, supervisor of the cafeteria, testified that in 1987 he used temporaries to fill in for vacancies caused by terminations or resignations. The Union was not notified of the use of temporaries because the personnel department told him he could use temporaries when necessary. Again the charges were settled but with the auspices of the Board's Regional Office on this occasion. The applicable paragraph in the notice to employees (G.C. Exh. 2) reads:

> WE WILL NOT unilaterally and without prior notification to or consultation with the Union subcontract certain exterior maintenance at our Indian Trail facility, subcontract the bakery production, bakery shipping and bakery mixing work at our Charlotte facility to temporary employees, subcontract certain maintenance work at our Indian Trail warehouse to temporary em-

[2] For the purposes of this section, casual and temporary employees are synonymous.

> ployees, change the work schedule of our produce department employees, implement a layoff procedure for unit employees in the wet and dry division of our bakery contrary to past practice.

The date of execution of the informal settlement agreement was September 11, 1987. Hanson testified that in negotiations on September 30, 1987, the Company asked to use casuals in the bakery for Halloween, Thanksgiving, and Christmas for the increased workload. The Union agreed to eigth casuals for 2-week periods for each of the three holidays.

During 1988 additional casuals were used in the cafeteria without notice to the Union. Following discussion of the issue and a charge filed by the Union the parties executed a letter of understanding on October 25, 1988, reaffirming the agreement previously embodied in paragraph 9 of the 1986 settlement agreement respecting the use of casuals. At the same time the parties executed an additional letter of understanding relative to the Respondent's right to change a person's hours or shift for up to 30 days without negotiating the change with the Union. This understanding was reaffirmation of a 1983 agreement.

The Company had cafeteria trouble again in 1989. Murray testified that one employee was out due to an injury and another had quit. Several temporaries were hired to keep the cafeteria running but without notifying the Union. The vacancies were posted but there was no response from employees. The Company then ran advertisements to fill the position. At some point the Union filed charges and a complaint issued. As a result of the series of charges over use of casuals, the Company in January 1990 proposed a change in language for the October 1988 letter of understanding. The Company wanted use of casuals for any necessary purpose including the interim period when a position is vacant (G.C. Exh. 4). The Union did not agree to the proposal.

Union Steward LeGrand testified that he complained in 1989 about the temporary employee in the cafeteria. Following his complaint Personnel Manager Brewer told LeGrand that the Company was ready to hire a full-time employee. In June 1990 the full-time employees in the cafeteria reported to LeGrand that a temporary employee was supervising them. LeGrand reported the continued use of a temporary employee in the cafeteria to Hanson and she wrote the Company a letter and filed an unfair labor practice charge.

Hanson testified that the Union filed the 1989 charge against the use of casuals because the Company was using temporary employees rather than hiring a full-time employee. The Company never notified the Union that there was a difficulty in filling any positions. Hanson also stated that the parties met in negotiations on May 21 and June 7, 1990, but the Company did not notify the Union of the May 1990 vacancy in the cafeteria, the difficulty encountered in filling the position or the use of casual employees to fill the vacancy. On June 26, 1990, Hanson wrote a letter to the Company objecting to the use of casual employees in the cafeteria. During a July 1990 negotiating session the parties discussed the use of casual employees in the cafeteria. The Company defended its use of casuals with the facts that no employee bid for the cafeteria position and the hiring process was unable to fill the position. Although the Union continued to object to the Company's use of casuals it did agree to a 2-week period in which casual employees could be used while further attempts were made to hire a full-time employee.

Analysis

General Counsel's complaint alleges three instances of Respondent's use of casuals in the cafeteria, November 10, 1988, October 6, 1989, and May 1990, as unilateral conduct in violation of its obligation to bargain with the Union.

The facts are basically undisputed, Respondent hired casuals to fill vacancies in the cafeteria at the cited times and did so without notifying or consulting with the Union. Respondent does not deny the testimony of General Counsel's witnesses but rather defends its actions by circumstantial ignorance or interpretive license.

Respondent has a history, evinced in this record and recent Board cases involving this Respondent, of ignoring or changing employment conditions of the bargaining unit employees without notice to or consultation with the Union, e.g., instituting a 4-day workweek for the salvage dock employees, changing the weekly work schedule of all produce department employees, changing employees restroom break policy, changing the job progression for mechanics, and using casual or temporary employees to circumvent its obligation to bargain with the Union over wages, hours, and working conditions of unit employees.

As the court noted in review of *Harris-Teeter*, 293 NLRB 743 (1989), and as I view the record evidence herein, the potential to abuse and undermine the effectiveness of the bargaining agent for the employees continues to exist. The potential is personified by the endless repetition of issues involving hours and working conditions of bargaining unit employees.

Although the parties meet, with some regularity, to negotiate a collective-bargaining contract there is little or no success. Respondent consistently, outside negotiations, seeks piecemeal, ad hoc, agreements from the Union on immediate workplace issues. Other than the ephemeral agreements sought by Respondent, the Union is not a recognized party to the representation of the employees unless and until it discovers some infraction. Once discovered Respondent seeks settlement. The clear intent is to minimize intercourse with the Union and it is accomplished by Respondent's self-seeming interpretations of its obligation to the Union.

The language of the 1986 agreement on casuals is clear. The enumerated uses of casuals does not include filling vacancies caused by terminations or resignations. The established posting and budding procedures designed for filling vacancies are equally as clear. These is no room for speculation or equivocation. I find it instructive that when Respondent is in need of groups of casuals (individuals can mingle whereas groups are more conspicuous) it notifies the Union and seeks a waiver of the written word in the name of profitable holiday seasons. Respondent's protestations that the agreement on casual labor was hastily drawn or that the intent was only to ensure a union wage for full-time employment is unavailing to explain its departure from the often defined bargaining obligation to the Union. Moreover, Respondent made no attempt in September 1987 or October 1988 to revise the language of the 1986 agreement to eliminate any perceived interpretation obstacle, whatever the reason. Instead, Respondent on those occasions when limited casuals were needed in circumstances proscribed by the 1986

agreement acted contrary to both the language of the 1986 agreement and its own past practice of seeking relief from the Union for the use of casuals. To further exemplify Respondent's manner in dealing with the Union and the language of the 1986 agreement, Murray's direct testimony of the submission of the January 8, 1990 proposal to the Union about future use of casuals was contradicted by his cross-examination which showed that no explanation of the proposal's paragraphs or Respondent's interpretation thereof was offered to the Union. Respondent's use of the Union when convenient and its ignominious disregard at all other times evinces a mind-set inimitable to good-faith bargaining envisioned by the statute. In consideration of the above, I conclude and find that Respondent's unilateral conduct in using casuals in the cafeteria on November 10, 1988, October 6, 1989, and May 1990 is violative of Section 8(a)(1) and (5) of the Act as alleged in paragraphs 17(c) and (d) of General Counsel's complaint.

D. *Direct Dealing with Employees on Changes in Work Schedules and Changing the Workweek of Employees, January 16, 1989*

In 1988 Christmas Day fell on Sunday, a regular workday for Salvage dock employees. Sometime before Christmas it was decided that employees would work Saturday, Christmas Eve, and be off Christmas Sunday. Johnson, day-shift manager, realized that the dock worked more efficiently on Saturday than it did on Sunday. The inefficiency focused on the switcher/spatter, an employee who moves trailers into position for the salvage dock employees to work, who also normally worked Sunday. All the trailers came back to the warehouse on Saturday and the switcher spotted them on Sunday. With the switcher working Saturday he could spot trailers as they came in and some drivers could back their trailer to the dock rather than leave them shuttered in the yard. In addition Craig who did not work weekends would give the dock an extra employee on Saturdays. Craig's regular work schedule was Monday thru Friday and he had gotten that schedule through the building process several years before. Johnson reported his revised work schedule to Kiser, who later gave him the go ahead. Johnson called the dock crew into his office and presented them with the temporary schedule which he said was a test of his theory of efficiency. Johnson testified that either Dunegan or Brewer or he asked if the employees had any questions. Johnson only recalled Craig responding by questioning the rotation of Saturday as a day off and stating he wanted to continue Saturday and Sunday off each week. Johnson then told the employees that the new work schedule was implemented. Johnson made the work schedule change without notification to or consolation with the Union because the 30-day agreement permitted the Company to do so.

Kiser testified that Johnson suggested a Monday to Saturday operation for the salvage dock rather than a Sunday to Friday to improve efficiency of the switcher. One employee had a set schedule Monday to Friday, one employee was Sunday to Thursday, and three employees rotated. The new schedule would rotate all five employees. The change was not negotiated with the Union because it did not have to be negotiated.

Murray, personnel administrator, in response to Kiser's query about adjusting the work schedules of salvage dock employees told Kiser he could do so in accord with the 30-day agreement. Murray was on the Respondent's negotiating team but did not notify the Union of the change in work schedules until the February 9, 1989 negotiating session. Murray explained that Respondent waited until February because that was the scheduled negotiation. He was aware that the Union after receiving a proposal usually wanted time to consider and to investigate.

Dunegan was present when Johnson gave each employee a copy of the new work schedule. He may have asked the employees, ''any questions?'' Dunegan did not ask employees for opinions because of the old unfair labor practice case. Dunegan recalled that several employees expressed displeasure with the new work schedule but it went into effect immediately. The charge was not negotiated with the Union because the Company can make any changes necessary for the operation for 30 days.

Several salvage dock employees testified to meeting in Johnson's office. Allen stated that Dunegan asked if employees liked the change and the employees said they did not like the change. Johnson told the group he would keep track of the new schedule for 30 days and before the 30 days is up let the Union know and make a decision. Rogers recalled that Johnson, after he passed out the new work schedule of A, B, and C teams asked if anyone had a comment. Rogers said he did not like the new days off preferring his Sunday through Thursday schedule. Johnson said the new schedule was effective immediately. Craig remembered Johnson stating that the workweek schedule would be changed to Monday through Saturday with a rotating day off, for 20 days. Johnson said it would be better for the switcher and a supervisor on Saturday would take some pressure off of him. Johnson asked the group, who was for it? Some said, ''yes,'' some said, ''no.'' Craig said, ''No'' and Johnson told Craig he was against it because he now has every weekend off. Johnson said the new work schedule would go into effect the next day for a 6-week period.

Steward LeGrand testified without contradiction that the 1983 agreement, referred to as the forerunner of the October 1988 letter of understanding respecting Respondent's right to change a person's hours or shift was based on a shift change from night shift to day shift to accommodate production. There was no temporary week schedule change and certainly no permanent change. Also the 1986 settlement agreement alluding to produce employees involved Respondent's unilateral change of an employee's work schedule at Christmastime without negotiating the change with the Union. LeGrand stated that Respondent has, since 1986, bargained with the Union over changing workweek schedules during holidays and special occasions such as Super Bowl Sunday.

Union Representative Hanson's testimony echoed LeGrand's relative to the 1983 agreement as a basis for the 1988 letter of understanding and the past practice of Respondent bargaining with the Union over changes in workweeks since 1986. Particularly 1987 that dealt with changes in several departments including the salvage dock. Hanson also stated that on January 20, 1989, 4 days after Respondent initiated the new workweek schedule, the parties met in a scheduled negotiation. The Company did not notify the Union at that time of the changed workweek for the salvage dock employees. At the February 9 meeting the Company informed the Union of the change made on January 16 and

proposed making the change permanent. The Union objected to the manner and means of the change and the workweek reverted in late February.

The objective evidence in the record shows that following by only months the 1986 settlement agreement, which included proscriptions against changing the working conditions of bargaining unit employees, Respondent changed the work schedule of a produce employee without negotiation with the Union. The work schedule change was settled September 11, 1987, with an official, ''Notice to Employees,'' declaring that Respondent would not unilaterally make such changes again. Subsequent bargaining included proposed changes in hours and days of the salvage dock employees and the building and grounds department employees. However in March 1988 Respondent dealt directly with employees in the salvage dock in an attempt to institute a 4-day workweek and admitting to the employees that such a change had to be discussed with the Union. Respondent's direct dealing was found on unfair labor practice in December 1988, *Harris-Teeter,* supra.

Analysis

Dealing Direct

The record evidence of Johnson's meeting with the salvage dock employees to announce a change in the work schedule is substantially undisputed. Respondent's admitted intent was to implement the work schedule change permanently by proposal to the Union following the test period of 30 days.

The testimony of all witnesses to the meeting shows that following the announcement of the change, some form of questioning of the employees occurred. Whether the questioning was of a direct form as stated by the employee witnesses or more subtle as stated by Johnson and Dunegan, the result is the same. The supervisors are attempting to ascertain the desires or opinions of employees on a mandatory subject of bargaining. Any argument to the contrary by Respondent is wholly unsupported by fact and incongruent with Respondent's stated view and its unbridled use of the 30-day agreement.

Obtaining and assessing employees' desires and opinions on wages, hours, and working conditions are the sole province of the employees' bargaining agent. Such conduct by the employer circumvents the Union as the exclusive representative of the employees. I therefore conclude that Respondent's questioning of its salvage dock employees relative to the work schedule change, particularly in light of its settlement and unfair labor practice history involving same or similar infractions, constitutes direct dealing with employees and I find that Respondent's conduct violates Section 8(a)(1) and (5) of the Act as alleged in complaint paragraph 17(b).

Changing the Work Schedule, January 16, 1989

Respondents current attempt to change work schedules of employees without bargaining with the Union is again directed at the salvage dock employees. Respondent defends its latest attempt with the language of the 1983/1988 agreements allowing changes ''in a person's hours and shift for 30 days without bargaining over the change.'' Hanson and LeGrand credibly testified to the basis of the 1983/1988 agreements. Clearly the agreements were designed to cover temporary situations arising from unforeseen circumstances.

This Respondent seems to thrive on ambiguity whether real or perceived. Case history of this Respondent shows that the Union is ignored and it does what it wants to do. I find the failure to notify the Union of the change at the first subsequent bargaining session, instructive. Respondent's use of the ''30 days language,'' in my view, is nothing more than an effort to implement conditions, however, short lived, without recourse by the employees or their representative. Murray's explanation of the lack of notice to the Union, not withstanding, Respondent's professed intent of a permanent change is a difficult pill to swallow. For the Union to consider any proposal of change that includes a predetermined start date it must have a reasonable advance notice to ensure consideration by such date. Nothing less than notice to the Union at its January 20, 1989 negotiating session would be reasonable. The wasted expense of time during the 30-day hiatus, without notice to the Union, dictates that the schedule would revert back. Moreover, there is no precedent for any ''30 day change'' to become permanent.

Respondent's use of bargaining in the past for temporary changes in employees work schedules (which in itself shows an understanding of the difference in ''a person's hours and shift'' and a person's work schedule) and evasion of bargaining over work schedules deemed to become permanent can only be explained by the convoluted reasoning offered by Dunegan, ''the company can make any changes *necessary* for the operation for 30 days.'' This reasoning is completely outside the express language of the agreement but well within Respondent's policies respecting its bargaining obligation to the Union.

It is abundantly clear to me that Respondent's known propensity for operating its distribution center as if the Union did not exist, continues. Based on the above I conclude that Respondent unilaterally and without notice to or consultation with the Union changed the work schedules of its salvage dock employees. I find that such conduct of Respondent violates Section 8(a)(1) and (5) of the Act as alleged in paragraph 17(a) of the complaint.

E. *The Cake Incident, December 23, 1988*

Respondent admittedly does not have a written rule against employees accepting gifts from vendors but insist there has existed since the Union came in an oral rule prohibiting employees from accepting gratuities from vendors. The rule is not known to all employees nor does the Union have any knowledge or notice of such a rule. Manager Johnson stated that employees know they cannot accept gifts but the rule has not been explained to the employees.

The record evidence shows that in the past several years employees have accepted gifts from vendors on several occasions. At times the oral rule has been applied and at other times it has not. Respondent's response to those occasions when employees accepted gifts and the rule was not applied was it had no knowledge of the gift. As a general rule the gifts were presented at Christmastime as tokens of the season but some gifts were otherwise.

Witnesses testified to the following gifts to employees from vendors: frisbees, donuts, hats, teddy bear, dresser, candy, and cake.

Dunegan, day-shift supervisor for the last 3 years, testified that shortly after assuming the day-shift responsibility, approximately April 1988, a vendor driver passed out frisbees to employees on the dock. Dunegan said nothing to the employees but counseled with Johnson. Dunegan then told the driver not to pass out gratuities to the employees anymore. Dunegan also recalled that Nelson Rogers, the contractor for the lumping service (some vendors hire unloaders locally to unload their trucks; Rogers supplies those employees to the vendors) had for years given donuts to employees. Rogers put several boxes of donuts in each of three offices. The produce department, the meat department, and the freezer department. Dunegan allowed the donut practice to continue for several years of his supervision then at some point in time he stopped it. Dunegan stopped the gratuitous donuts because the employees were squabbling over who got what and how many. Dunegan was not aware of any other gifts.

Kiser and Murray testified that a produce vendor in 1987 brought hats for the dock employees but there were not enough to go around. Murray suggested getting more hats so each could have one but an inquiry of the vendor disclosed that no more hats were available. Murray told Kiser to flip a coin or do something fair. Kiser gave the hats to Johnny Davis to distribute to the produce employees who names had been drawn out of a hat.

Davis, a produce employee, testified without contradiction that a floral vendor in 1987 gave a teddy bear to Pat Dulin, a floral department employee. Dulin put the teddy bear in Johnson's office during the workday and took it home with her that night.

Stanley Little, a produce employee, also testified without contradiction that in mid-1989 while he was cleaning the front dock a vendor driver had a couple, assemble yourself dressers, left over and offered one to Little. He accepted the dresser and asked Dunegan about taking it out to his car. Dunegan told Little after he clocks out at noon he could take the dresser to his car. LeGrand also testified that Little got a dresser from a vendor and carried it outside the gate during the day.[3]

Several witnesses testified to the cake and candy gifts at Christmastime 1988. Day Distribution Manager Johnson was only aware of the candy and cake gifts. He received at his office a basket of candy addressed to Hubert Sturdinant and Johnson signed for it. Johnson took the basket to Kiser who suggested holding if for the Christmas table. Several days later Johnson got a call from the vendor inquiring about the candy because Sturdinant had told the vendor it was not received. Johnson explained to the vendor that the candy would be put on the Christmas table for all employees to enjoy. The vendor told Johnson he would send another for Sturdinant and Johnson told the vendor if he did send another it would go to the Christmas table also. Johnson further stated that about the same time he got a call from the produce lawyer, James Hill, who said a vendor driver had delivered a cake to the produce receiving employees. Johnson told Hill to have the cake sent to his office. The driver brought the cake to Johnson and he told the driver that the Company did not allow bargaining unit employees to accept gifts from vendors. Johnson said he would put the cake on the Christmas table. Later Johnny Davis complained to Johnson about the receiving employees not getting the cake.

Johnson told Davis that the cake was for all produce employees and he and Kiser decided to put the cake on the Christmas table. Davis returned to Johnson's office later with Steward LeGrand to object to the cake being taken from the receiving dock employees. Johnson told them both to file a grievance if they did not like it. At some time Johnson sent letters to the vendors informing them of the rule prohibiting employees from receiving gifts from vendors.

Murray stated that the unwritten rule prohibiting employees from accepting gifts from vendors originated as a control of bribery of employees by vendors for favored treatment and to eliminate favoritism between the union and nonunion employees in the bargaining unit.

Kiser, director of the entire center, substantiated Johnson's testimony of the candy and cake gifts and the use of the Christmas table.

Johnny Davis, a union witness in the prior case testified that on December 23, 1988, a lady truckdriver gave him a cake saying, make sure the employees get pieces. She then went to Hill's office. Shortly she returned to Davis and said the employees could not have the cake and that Hill told her to take it to Johnson's office. She took the cake and left. Later Davis went to Johnson's office. Davis testified:

> After the lady left I went over and asked Mr. Johnson why we couldn't, you know, have the cake and that she had brought it for the Produce Department?
>
> And he said, you know, because of the Union that we couldn't have the cake. I told him that she had brought the cake for us because, you know, she was just giving it to us as a Christmas present. Then the phone rang and he said, ''Well, it's not my Union. Go ask John LeGrand why you can't have the cake.''
>
> Q. What then happened?
>
> A. Then I went and asked John LeGrand, I said, ''Dwight Johnson told me to come back here and ask you why we couldn't have the cake.''
>
> Then John LeGrand asked me to repeat myself and I told him. Then we went over to Dwight Johnson's office.
>
> Q. Who was in Mr. Johnson's office when you went over, do you recall?
>
> A. When we went over to his office John Brewer and Mr. Johnson was in there.
>
> Q. Do you recall what conversations took place? What was said at this meeting?
>
> A. John asked him why we couldn't have the cake. And he, you know, explained that if everybody in the warehouse couldn't get a piece of it, then nobody else could have any.
>
> Q. Who did he ask?
>
> A. Who did John LeGrand ask?
>
> Q. Yes, you said that he asked ''him,'' who is ''him''?
>
> A. He was talking to Mr. Johnson.
>
> Q. What other conversations took place, if you recall?

[3] The testimony of Dunegan and Goodwin relative to the purchase of a stereo cabinet is not relevant to the issue of gratuities from vendors. In addition the stereo cabinet is not the dresser Little testified to receiving.

A. Then later on Donald Dunegan came in Mr. Johnson's office and we was going over what—you know, people receiving things and Donald Dunegan said that one day a truck driver was coming down the dock passing out Frisbees, you know, to everybody that was on the dock working. Donald said that he didn't—he wasn't aware of any rule that you couldn't receive gifts from truck drivers.

Steward LeGrand stated that Davis told him a driver had given him a cake and at breaktime the employees would eat it. Davis later reported to LeGrand that Johnson had taken the cake and said the employees could not have the cake because of the Union. LeGrand and Davis went to Johnson's office. LeGrand testified:

When we went in the office I think Donald Dunegan, Dwight Johnson and Mike Kiser were there.

Q. Can you identify Mr. Johnson and Mr. Kiser?

A. Yes, I can.

Q. For the record, who are they?

A. At that time Mike Kiser was Director of Distribution, I think, and Dwight was Warehouse Manager.

Q. What was said and by whom in this session?

A. When we were going into the office I told Dwight I wanted to see him. I said that Johnny has just informed me that they had told him that we couldn't have the cake because of the Union. Mr. Kiser spoke up and said, ''That' right. This is your Union.''

I responded. I said, ''You mean to tell me that if we didn't have a Union we could have the cake?''

He said, ''Probably.''

And then we went on and I asked Dwight, I said, ''Dwight, do you not have a policy saying an employee is not supposed to take anything from a truck driver or vendor?''

Dwight mumbled and I asked him again.

He said, ''Yeah, they had a policy.''

Q. Was anything else said in that meeting?

A. They just told us they were going to put the cake out on the table and let everybody eat it.

Analysis

In brief General Counsel moved to delete paragraph 17(f) from her complaint. I grant General Counsel's motion and strike paragraph 17(f) from the complaint. Thus General Counsel relies solely on paragraph 9(a), as amended on January 15, 1991, with regard to Respondent's conduct and the gifts to employees from vendors. In paragraph 9(a) General alleges Respondent violated Section 8(a)(1) of the Act by informing its employees they could not accept gratuities from other businesses because of their union activities. General Counsel does not question the existence of the oral rule prohibiting gifts, only its application to the gift of the cake.

Murray's explanation of the dual purpose for the rule clearly shows reasonable concern for common factors that are extent in the workplace. However, a rule is only as good as its enforcement and unannounced oral rules experience a double difficulty in enforcement.

The uncontradicted and credited testimony of Davis, Little, and LeGrand establish that in the past employees have received gifts from vendors either without incident or with the aid of management enforcing the rule. In my view, enforcement of the rule depends on which supervisor has knowledge of the gift, the nature of the gift, which employee is the recipient of the gift or how knowledgeable the supervisor is of the oral rule.

If a purpose of the rule is to control the incidence of bribery of employees it is hardly accomplished by failure to announce to employees what conduct is prohibitive. More particularly, when management knows from experience that it cannot control the vendors conduct, communication to the employees is critical. Likewise, allowing gifts on certain occasions and not on others destroys the very uniformity that is sought as the partial basis for the rule. The defense of lack of knowledge of all gifts emphasizes Respondent's lack of attention to enforcement of its rule and is in contrast to that expressed to the employees when the cake was the subject gratuity to Davis.

I find it instructive that the gift occasions that either fell through the cracks or were enforced by modification occurred prior to the most recently referenced third case involving this Respondent or so postdated the third case that the atmosphere of the moment had waned. Obviously, Dunegan's admonishment to his employees in late September 1988, ''I'm going to be keeping a better watch on you,'' originated with and was shared by his supervisors. Additionally, the undenied references to the Union at the time the rule was enforced against the cake gift serve to further support an inference that the rule may have been, yet again, modified if the employees involved were not union activists. I do not accept Respondent's argument in brief that the ''union references'' were violated and therefore noncoercive. Davis was a known witness against Respondent in its unfair labor practice case concluded in early September 1988 and confiscation of a carrot cake to deny six to eight receiving employees a breaktime repast is retaliatory. To stand behind its ersatz rule for uniformity by placing an ordinary cake on a Christmas table for *all* 100 employees to enjoy in demigod like and an insult to the working man or woman. I conclude that Respondent's conduct tended to interfere with and coerce employees in the exercise of their Section 7 rights. I therefore find that Respondent's conduct violates Section 8(a)(1) of the Act as alleged in paragraph 9(a) of the complaint.

F. *Unilateral Removal of Refrigeration Mechanics Work from the Bargaining Unit*

The facts surrounding this issue are undisputed and are partially reported in section II, Background. The additional facts are:

The Union organized Respondent's distribution center and the certified unit included the refrigeration mechanics who serviced all the retail stores which were nonunion. Each mechanic was assigned a substantially equal number of stores to service as his territory. The territories were designed respecting the personal domicile of the mechanic and the geographic layout of the stores approximate to his domicile. Over the years Respondent closed old stores and opened new stores causing a realignment of mechanic's territories to maintain an economically and geographically feasible service area. In addition Respondent purchased stores from other food chains. Such purchases included the refrigeration mechanics who serviced those stores albeit the mechanics of the purchased stores did not become part of the bargaining unit.

The resultant realignments of the mechanics territories caused some bargaining unit mechanics to cease servicing original Harris-Teeter stores and begin servicing newly purchased stores. As expected some of the nonbargaining unit mechanics began servicing original Harris-Teeter stores as well as the stores newly purchased. At all times the bargaining unit mechanics serviced only nonunion stores but the original identity of the retail stores, whether Harris-Teeter, Food World, or Big Star, was lost by merging into the respective geographic territory. In a sense the identity of the refrigeration mechanic was also lost except for the name on the Union's membership list. Respondent did for business purposes attempt to keep the territories equalized by work loads of the mechanics although with distance to travel in the equation the number of stores serviced were not always equal among the territories. Over the years there was very little turnover of mechanics therefore the vast majority of territory realignments were occasioned by retail store openings and closings. Respondent always realigned territories of the mechanics based on its own administrative needs and without notice to or consultation with the Union.

On October 28, 1990, Wade Sexton a bargaining unit refrigeration mechanic was terminated. His assigned territory was in the Raleigh, North Carolina area. Following his termination Respondent temporarily assigned his stores to nonunit mechanics as extra work. Respondent, anticipating a grievance over the discharge and possible reinstatement of Sexton formulated contingency realignments covering both Sexton's reinstatement and/or validation of his termination. In all events the stores previously assigned to Sexton were reassigned to nonunit mechanics. All stores previously serviced by nonunit mechanics continued to be serviced by nonunit mechanics. Again this realignment was effected without notice to or consultation with the Union.

In a November 20 grievance meeting concerning Sexton's discharge the Union learned for the first time Respondent's practice of using unit and nonunit mechanics to fill in for each other during absences and vacations and realigning the territories of refrigeration mechanics when stores closed or opened. The Union also learned that the job vacancy created by Sexton's termination had not been posted. There is no agreement between the parties requiring vacancies to be posted. The parties do have an agreement that when job vacancies are posted they remain posted for 3 days with a copy of the posting to the Union including who bids on the job and who is awarded the job. The Company usually mails a packet of postings to the Union and there is no time limit for mailing the information. Steward LeGrand stated that generally when a vacancy occurs and the job is to be refilled the job is posted within a day, 2 days, or 10 days. Price, manager of field service for all retail stores, stated that Respondent did not want to hire a mechanic and then be faced with reinstating Sexton. Also warehouse vacancies are more easily filled by job bidding because of the lower skills level whereas a refrigeration mechanic requires unique skills and experience. Price added that the maintenance mechanics who service the commercial refrigeration units in the warehouse could not qualify as a mechanic to service the retail stores and vice versa.

Hanson, the union representative, objected to the commingling of refrigeration mechanics' work stating that the Company was acting contrary to its positions taken in the past where in it denied bargaining unit employees the right to transfer to or bid on jobs outside the bargaining unit. The Respondent agreed to consider reinstatement of Sexton. The parties scheduled the meeting for December 13, 1990.

In preparation for the December meeting Price prepared territory reorganization lists of refrigeration mechanics with store assignments, one for bargaining unit mechanics including a territory for a new mechanic and one for nonbargaining unit mechanics. The lists included a summary of total store assignments for the unit mechanics and the nonunit mechanics both pretermination of Sexton and posttermination of Sexton. Price intended to present the lists and summary to the Union as the reorganization of mechanics territories following Sexton's termination. The presentation would have been the first time Respondent gave notice to or consulted with the Union about realignment of refrigeration mechanics territories since certification. The morning of the scheduled meeting Respondent received notice of the unfair labor practice charge covering the reassignment of Sexton's work following his discharge. On receipt of the charge Respondent's negotiating team removed presentation of the reorganization lists to the Union from the agenda for the meeting. The job posting for Sexton's vacancy was posted on January 10, 1991. Sexton's discharge is not the subject of an unfair labor practice charge.

Analysis

General Counsel's complaint allegation reads: 17(g) Failed since on or about October 8, 1990, to post a refrigeration mechanic bargaining unit job, and assigned, and has continued to assigning since that date, work previously performed by a refrigeration mechanic bargaining unit employee to employees not in the bargaining unit; and/or removed said work from the bargaining unit.

General Counsel argues that the 3-month hiatus in posting Sexton's job vacancy constitutes a break of post practice and therefore is an 8(a)(5) violation. She supports her argument with an implicit holding that job posting is a mandatory subject of bargaining. Albeit I may agree that job posting is a mandatory subject of bargaining and that a breach of a past practice of job posting procedures may constitute a violation of Section 8(a)(5), the record facts do not provide a basis for the contentions. The uncontroverted record evidence shows that the parties did bargain over job posting of vacancies in the bargaining unit, however, the only agreement reached was for Respondent to supply the Union with copies of postings and information on employees utilizing the procedure. Respondent was not required to fill all vacancies nor was it required to post in a given time period those vacancies it decided to fill. Further, with regard to the posting hiatus only, Respondent's position that it did not want to hire a new employee before Sexton's termination was final is most reasonable considering all the circumstances. I conclude and find that Respondent's failure to post the subject vacancy for 3 months is not a violation of the Act and I shall dismiss that portion of General Counsel's complaint allegation.

Respecting the remainder of the complaint allegation General Counsel argues:

> As discussed at trial, it is a somewhat unusual situation when one job classification encompasses both unit and nonunit employees performing essentially the same

tasks. Were it necessary to rule on the propriety of this historical situation, or on Respondent's frequent territorial adjustments over the years, painstaking detail would be required at this juncture to frame the issues.

In fact, such an undertaking is not necessary, for neither the propriety of the establishment of nonunit refrigeration mechanics nor the historical portion of unit versus nonunit work is at issue here.[23] Rather, those factors are all given. All that has been put at issue by the present complaint is the conduct of Respondent within a discrete time frame beginning on October 8, 1990, when Respondent began assigning work undeniably performed by a unit mechanic to nonunit mechanics.

[23] In this regard, it should be noted that, subsequent to the hearing, the parties entered into an agreement that *all* of Respondent's refrigeration mechanics would be in one unit, separate from the existing collective-bargaining unit at Respondent's Charlotte facility. (Counsel for Respondent and Charging Party have been contacted and agree that counsel for General Counsel may make this representation.)

Unlike General Counsel I cannot overlook the establishment of nonunit refrigeration mechanics merely as a historical situation. Respondent's acquisition of Food World and Big Star facilities and employees is a classical case of accretion. The mechanics of Food World and Big Star would have been included in the existing unit if they had existed at the time of the original representation proceeding. There is interchangeability among the two groups, common supervision and similar terms of employment. Identical job classifications, administrative integration of the two groups and both operate in the same geographic area as refrigeration mechanics here in the past. If I were faced with the unit placement determination of the nonunit refrigeration mechanics I would find them on accretion to the existing unit. However helpful such a determination might be to a resolution of the unit work issue, the unit placement of the nonunit refrigeration mechanics is not before me. Of course the Union can at anytime subsequent to the acquisition of Food World and Big Star facilities and mechanic employees file a unit clarification petition requesting inclusion of the nonunit mechanics in the certified unit.

With regard to the Respondent's historical practice of realizing the territories of the refrigeration mechanics in the bargaining unit and particularly in those situations arising from absence and vacation, there is no obligation to bargain, per se. Respondent has a right to conduct its business as it did before the union certification unless a practice is changed by agreement and incorporated into a contract. As noted before there are several ad hoc agreements respecting specific disputes between the parties but no progress in establishing a collective-bargaining agreement. Certainly there is no agreement, ad hoc or otherwise, pertaining to administrative control of the refrigeration mechanics' territories. It appears to me that the dynamics of the situation would preclude any meaningful bargaining, much less any agreement between the parties prescribing methods different than those applied by Respondent in the past within the bargaining unit.

Respondent's acquisitions of Food World and Big Star stores and refrigeration mechanics presents a different picture. The Respondent has an obligation to bargain with the Union whenever any circumstances, however remote or unrelated to the bargaining unit, will impact the established wages, hours, terms, and working conditions of the represented employees. Otherwise a union's exclusive representative status for an identified group of employees would become meaningless. Continuing a past practice within the bargaining unit is one thing but extending that past practice to outside the bargaining unit with a comingling of effects is something else. In my view Respondent could have freely maintained a separate work force of nonunit mechanics originating with the acquisitions but it could not merge the bargaining unit and nonbargaining unit mechanics, administratively and/or operationally without first giving notice to and consulting with the Union. To do so without bargaining, and without regard to passage of time, cannot gain Respondent any advantage. I conclude that Respondent did act unlawfully when it assigned work previously done by bargaining unit refrigeration mechanics to refrigeration mechanics not in the bargaining unit. The fact that no bargaining unit mechanics actually lost work as a result of the transaction is irrelevant. It is the unilateral conduct that is subject to scrutiny not a quantitative analysis of the results of the conduct. Accordingly, I find that Respondent did remove work from the established bargaining unit employees in violation of Section 8(A)(5) of the Act as alleged in General Counsel's complaint.

Respondent's contentions, best characterized as ''waiver'' or ''constructive notice'' arguments do not in my view dictate a different result. It is not the Respondent's right to make the decision nor the method Respondent chooses to implement its decision that must come into focus. Rather it is the effect the decision and the methods used have on those employees who have chosen to be represented. That representative has a statutory right to protect the interest of the employees in the bargaining unit that is not qualified by any qualitative analysis by Respondent.

CONCLUSIONS OF LAW

1. The Respondent by discriminatorily issuing warnings to its employees has violated Section 8(a)(1), (3), and (4) of the Act.

2. The Respondent by enforcing its oral rule against employees accepting gifts from vendors based on an employees' union sympathies has violated Section 8(a)(1) of the Act.

3. The Respondent by dealing directly with its employees on changing the work schedule and unilaterally changing the work schedule of its employees has violated Section 8(a)(1) and 5) of the Act.

4. The Respondent by unilaterally employing casual employees to work in the cafeteria has violated Section 8(a)(1) and (5) of the Act.

5. The Respondent by unilaterally removing work from its bargaining unit refrigeration mechanics has violated Section 8(a)(1) and (5) of the Act.

6. General Counsel has failed to prove that Respondent violated the Act by changing the work assignment of its employee Roosevelt Woodley or that it promulgated a rule forbidding employees to talk to each other while assembled in groups.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

This record clearly shows that Respondent has a proclivity to violate the Act and I conclude that Respondents identical conduct in its continued violations demonstrate an utter disregard for its employees' basic statutory rights and those of its employees' chosen representative. I shall therefore include a broad remedial order. See *Hickmont Foods*, 242 NLRB 1357 (1979).

I shall not order a make-whole remedy for the bargaining unit refrigeration mechanics. Contrary to General Counsel I do not view the hours consumed by nonunit refrigeration mechanics assigned the work formerly done by unit mechanic Sexton as a measure of the amount of work unlawfully removed from the bargaining unit. The record does not substantiate that only bargaining unit mechanics should have performed the work formerly done by Wade Sexton, the discharged unit mechanic.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Harris-Teeter Super Markets, Inc., Charlotte, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily issuing warnings to its employees for infractions of company rules.

(b) Enforcing its oral rule against employees accepting gifts from vendors based on an employee's union sympathies.

(c) Dealing directly with its employees over changes in work schedules.

(d) Unilaterally changing the work schedules of its 25 employees.

(e) Unilaterally employing casual employees to work in its cafeteria.

(f) Unilaterally removing work from its bargaining unit refrigeration mechanics.

(g) In any other manner interfering with, restraining, or coercing employees in the exrcise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Expunge from its files any references to the warnings issued to its employees, James Craig, Terry Rogers, Doug Blake, and Donald Allen on September 28, November 3, December 6, and December 22, 1988, and January 27, 1989, and notify them in writing that this has been done and that evidence of these unawful warnings will not be used as a basis for future personnel action against them.

(b) Either reduce its oral rule against employees accepting gifts from vendors to writing or explain the substance of the rule to all its employees and post notices in conspicuous places for all vendors to see.

(c) Bargain collectively in good faith with the Union as the exclusive bargaining representative of all employees in the unit as certified by the Board.

(d) The appropriate bargaining unit for purposes of collective bargaining is:

> All employees employed by Respondent at its Charlotte, North Carolina distribution center and bakery including leadmen, dispatchers, warehouse clerical employees, drivers, fork lift maintenance employees, refrigeration mechanics and regular part-time employees, excluding office clerical employees, managerial employees, professional employees, guards and supervisor as defined in th Act.

(e) Post at its offices in Charlotte, North Carolina, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''